FOR ARGUMENT

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No. 76-1572

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
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Respondent concedes (Br. 11) that, in imposing sentence upon a convicted defendant, a federal trial judge properly "can take into account information concerning the defendant's life, health, habits, conduct, and mental and moral propensities, including hearsay reports about the defendant's character and hearsay evidence of defendant's prior criminal activity which had not resulted in a charge or conviction," such as evidence of "arrests, pending indictments, dismissed charges, charges reversed on appeal, and charges resulting in acquittal * * *." Respondent argues, however, that a defendant's decision to present false testimony at trial is inherently different from these other sentencing factors and that its consideration in sentencing would unconstitutionally "chill" the exercise of a defendant's right to testify in his own behalf. We submit that none of the reasons offered by respondent supports these contentions.

1. In attempting to distinguish false trial testimony from other conduct bearing upon the character of a convicted defendant, respondent relies (Br. 17-19) upon the fact that perjury is a crime for which alternative legal sanctions are available. The same could of course be said of a defendant's prior arrests or convictions, consideration of which has always been thought legitimate in imposing sentence. But a more significant flaw in respondent's argument is that it misperceives the purpose for which a sentencing judge considers a defendant's false trial testimony, which is *not* to add a separate punishment for perjury, but rather to assist in determining the defendant's need for, and prospects of, rehabilitation and hence in fixing the appropriate punishment for the crime for which the defendant has been convicted. Thus, if the commission of perjury were not a crime, but merely a morally reprehensible act, the government would urge just as strongly that a sentencing judge could properly take the factor into account, yet in such circumstances respondent's objections would be inapposite. It would make little sense, however, to exclude bad acts shedding significant light on a defendant's character from the sentencing determination simply because those acts are sufficiently serious to justify the imposition of criminal sanctions.

2. Respondent suggests (Br. 19-21) that false testimony by a defendant at his own trial is irrelevant to a proper sentencing determination. It may be that, as respondent speculates (Br. 20), some defendants commit perjury out of an understandable desire to preserve their liberty rather than as a result of a pervasive character defect, and that many other defendants choose not to testify at trial, to testify truthfully, or to plead guilty out of expediency rather than repentence. It hardly follows from this premise, however, that a defendant's decision to lie under

oath invariably lacks probative value with respect to any recognized goal of sentencing. If nothing else, a defendant's willingness to commit perjury reflects a belief that the accepted norms of society are subordinate to his own self-interest. Respondent's argument is more appropriately directed toward the weight that the trial judge should give to the defendant's perjury in a particular case, not to whether he may consider it at all.

3. Respondent's allegation (Br. 24) that "[p]erjury is the only [sentencing] factor the existence of which is determined by the trial judge" alone also is not accurate. A judge obviously does not make the determination whether perjury has occurred in a vacuum, but rather relies upon the contradictory evidence offered by other witnesses. Moreover, the jury's verdict of guilty is generally a reliable indication that it too viewed the defendant's exculpatory testimony as unworthy of belief.[1] Perhaps more important, trial judges frequently consider other, unquestionably legitimate, factors in sentencing, such as the relative culpability of co-defendants, that are based solely upon their personal assessment of the evidence adduced at trial. Finally, even were petitioner's premise correct, he suggests no reason why a trial judge should be prohibited from taking his own factual conclusions into account in fixing a suitable sentence but should be permitted to consider the conclusions of others,

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[1]Although respondent asserts that the jury's verdict in this case was not inconsistent with his trial testimony, Judge Rosenn, after a review of the trial record, concluded that "the falsity of [respondent's] testimony [was] necessarily established by the finding of guilt" (Pet. App. 31a). This conclusion was not disputed by Judges Garth or Adams.

as detailed, often in cursory fashion, in the presentence report.[2] A defendant's prior arrests, after all, may represent nothing more than a single police officer's determination that there was probable cause to believe that the defendant had committed a crime. Having presided over the entire trial and having observed firsthand the defendant's demeanor while on the witness stand, the sentencing judge is in an excellent position to determine whether the defendant knowingly gave false testimony, and there is no justification for indulging a presumption that such determinations will frequently be suspect.[3]

4. Respondent argues (Br. 28-33) that a trial judge's consideration of perjury as a sentencing factor would

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[2]Respondent's reliance (Br. 25 n. 17) upon *Specht* v. *Patterson*, 386 U.S. 605, is misplaced. In *Specht*, this Court extended due process safeguards to a Colorado procedure under which a defendant, after having been convicted of a specified sex offense, could be subjected to substantial additional imprisonment if the sentencing judge found him to be a threat to the public or to be a habitual offender and mentally ill. Thus, the Colorado statute made the commission of one crime "the basis for commencing another proceeding under another Act" (386 U.S. at 608), a proceeding that could lead to punishment beyond that authorized for the crime of which the jury had found the defendant guilty. Here, the court had no power to impose upon respondent punishment greater than that authorized for the crime of prison escape. *Specht*, in which the Court expressly "adhere[d] to *Williams* v. *New York* [337 U.S. 241]" (386 U.S. at 608), thus was concerned solely with a defendant's right to due process in sentencing, not with the types of information that a trial judge may properly take into account. Respondent does not contend that he was denied any required procedural protections during his sentencing proceeding.

[3]Respondent's repeated assertion (Br. 18 n. 12, 25) that the "two witness" rule demonstrates Congress' recognition of the difficulty of proving perjury overlooks 18 U.S.C. 1623, which eliminates the rule in prosecutions for perjury before courts or grand juries. See, *e.g.*, *United States* v. *Isaacs*, 493 F. 2d 1124, 1155-1156 (C.A. 7), certiorari denied, 417 U.S. 976.

"chill" the exercise by criminal defendants of their right to testify in their own behalf.[4] We have addressed this quite unrealistic contention in our opening brief (at pp. 23-28) and will not repeat those arguments here. We note, however, that *respondent* was not deterred from taking the witness stand in his own defense, despite his acknowledged awareness (Br. 30) that trial judges often consider a defendant's false trial testimony in sentencing. There is, in addition, not a shred of empirical data to prove that defendants have chosen not to testify out of fear that their truthful testimony would be viewed by the trial judge as perjurious and would result in a harsher sentence in the event of a conviction.

5. Finally, there is no merit to respondent's suggestion (Br. 31-34) that this Court should affirm the decision below as an exercise of its supervisory powers over the lower federal courts. This Court has frequently acknowledged that the power of the judiciary to formulate and apply rules of procedure and evidence "exists only in the absence of a relevant Act of Congress" (*Palermo* v.

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[4]Contrary to respondent's assertion (Br. 32-33), *Brooks* v. *Tennessee*, 406 U.S. 605, is not "closely analogous" to this case. There, a Tennessee statute compelled criminal defendants to decide whether to testify before any other defense evidence had been admitted. The Court held that this requirement placed an impermissible restriction on the defendant's right to testify because it deprived him of the opportunity to assess whether the need for his own testimony justified the risks involved in taking the stand. 406 U.S. at 609-610. By contrast, a rule allowing the sentencing judge to take a defendant's false testimony into account at sentencing would place no restriction upon the exercise of the defendant's determination whether to testify, but rather would merely subject the defendant to one of the risks of taking the witness stand that prompted this Court's decision in *Brooks*.

United States, 360 U.S. 343, 353 n. 11),[5] and Congress has expressly provided in 18 U.S.C. 3577 that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Thus, the sole issue presented is whether there is any constitutional bar to a trial judge's decision, in an appropriate case, to take into account a defendant's willingness to lie under oath in an effort to escape criminal liability as one factor in his individualized sentencing determination. In light of the diverse factors that respondent concedes that a sentencing judge may consider, respondent's inability to distinguish perjury, and the trial judge's unchallenged finding that respondent's "defense was a complete fabrication without the slightest merit whatsoever" (App. 107), we submit that the sentence in this case did not violate respondent's constitutional rights.

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed insofar as it vacated respondent's sentence and remanded the case to the district court for resentencing.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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[5]See also *Gordon* v. *United States*, 344 U.S. 414, 418; *Funk* v. *United States*, 290 U.S. 371, 382.